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George P. Smith II

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FROM CUTLASS TO CAT-O'-NINE TAILS: THE CASE FOR INTERNATIONAL JURISDICTION OF MUTINY ON THE HIGH SEAS

*George P. Smith, II**

Brother Seamen, You fee before you three lusty young fellows about to fuffer a fameful death for the dreadful crime of mutiny and defertion. Take warning by our example never to defert your officers and should they behave ill to you, remember it is not their caufe, it is the caufe of your country you are bound to support.¹

For those who, by profession, go to sea in ships, it is axiomatic that the authority of the captain or master of the vessel is paramount on board the vessel, subject only to the laws of the flag nation and international law.² The power of the captain or master of a vessel has sometimes been compared to that of a parent, and the captain has the power to punish, discipline, and compel obedience for the limited period of the duration of the voyage.³ Like children, seamen are sometimes moved to challenge the authority figure.⁴ On board ship, such a challenge may result in the hazarding of the vessel, impairment of the proper functioning of the navigational duties, and endangerment of the crew and passengers.⁵ Such behavior on board a vessel is termed

* B.S. 1961, J.D. 1964, Indiana University; LL.M. 1975, Columbia University. Professor of Law, Catholic University Law School.

I wish to acknowledge the research assistance of a former student, Charles W. Gittens, Class of 1987, in the preparation of this article, as well as the facilities of The Nimitz Library at the United States Naval Academy in Annapolis, Maryland, and the (Royal) Maritime Library in Greenwich, England.

1. Statement of John Milward, convicted H.M.S. BOUNTY mutineer, upon being brought on deck for execution of sentence of death by hanging. J. DEIGHTON, MINUTES OF THE PROCEEDINGS OF THE COURT MARTIAL HELD AT PORTSMOUTH, AUGUST 12, 1792 ON TEN PERSONS CHARGED WITH MUTINY ON BOARD HIS MAJESTY'S SHIP THE BOUNTY 58 (1794).

2. "It must be remembered that the maritime law gives to the master aboard ship a power unknown on land, other than the military service. The degree of control given to him is quite different from that of the employer and employee relationship on land." 1 M. NORRIS, THE LAW OF SEAMEN 389 (4th ed. 1985); see also *United States v. Colby*, 25 F. Cas. 490, 491 (D. Mass. 1845) (No. 14,830).

3. *United States v. Alden*, 24 F. Cas. 768 (C.C.D. Mass. 1844) (No. 14,427).

4. See *United States v. Bladen*, 24 F. Cas. 1161 (C.C.D. Pa. 1816) (No. 14,606); see also *infra* text accompanying notes 14-78.

5. The authority and responsibility of the captain or master for the safe operation of his vessel has been recognized by American courts from early times. Judge Sprague, in deciding *United States v. Colby*, 25 F. Cas. 490 (D. Mass. 1845) (No. 14, 830) states that:

[e]ven though the captain be in the wrong, or gives his orders in a harsh or insolent manner,

mutiny.⁶ Because the operation of a vessel generally requires that such a ship operate on the high seas, outside the territorial jurisdiction of any state,⁷ the issue of applicable law pertaining to apprehension, capture and punishment of mutineers is significant. The question raised is whether mutiny violates both international law and municipal law or whether only municipal law applies in such cases.⁸ Additionally, the characterization of the acts resulting in a mutiny may implicate other issues of international law such as whether extradition of the mutineers is available⁹ and whether the acts of the mutineers constitute piracy,¹⁰ punishable under international as well as municipal law.¹¹

This article will first discuss the historical background of mutiny, describing several of the major mutinies at sea that have been of interest to legal historians. Then will come an analysis of the history of piracy and an exploration of its symbiotic relationship with mutiny. Subsequent analysis will be given over to municipal law provisions outlawing mutiny — with concentration placed on the postures taken by those nation-states which subscribe to or are guided by the common law. A study of those relevant principles of international law regarded as controlling, as a consequence of historical vectors of force and municipal law, is then presented. Finally, the article examines the laws of extradition. The conclusion to be drawn from the analysis is that although there is no international law encompassing mutiny *qua* mutiny, the existing international legal structure affords ample room for a construction that permits a broad assertion of jurisdiction in order to bring mutineers to justice.

or punishes without sufficient cause, still the seaman, while at sea, must submit to the wrong and wait for redress till his return to port, rather than resort to violence, unless the wrong threatened to be done will work an irreparable injury.

Id. at 491.

6. Mutiny and revolt are often used interchangeably in this context. Justice Story provided a clear definition of revolt in *United States v. Haines*, 26 F. Cas. 62 (C.C.D. Mass. 1829) (No. 15,275): "It is an open rebellion of mutiny of the crew against the authority of the master in command, navigation, or control of the ship. If the crew in a mutiny were to displace him from command of the ship . . . that would clearly be a revolt." *Id.* at 64.

7. Ships sailing on the high seas come under the exclusive jurisdiction of the state whose flag they fly, except in exceptional cases provided for in international law. Geneva Convention on the High Seas, April 29, 1958, art. 6, 13 U.S.T. 2312, T.I.A.S. No. 5200, U.N. Doc. A/conf. 13/L 53.

8. See *infra* notes 79-219 and accompanying text.

9. See *infra* notes 220-30 and accompanying text.

10. See *infra* notes 162-219 and accompanying text.

11. See *infra* notes 162-69 and accompanying text.

I. AN HISTORICAL BACKGROUND OF MUTINY AT SEA

Since the era of Thucydides, the seas have been an important means of commerce. Countries aspiring to greatness, having long recognized the value of the seas as a means of furthering commerce and trade, had spent willingly immense quantities of money developing merchant and naval fleets.¹² Of course, such fleets required commensurately large numbers of seamen to staff and maintain them. Because of the arduous nature of sea duty and the fact that the lower economic classes have supplied the majority of the common seamen, the fleets of the world have often encountered breaches of discipline on board vessels serious enough to be termed mutinous.¹³

Not surprisingly, the nations with the most experience with large fleets, both merchant and naval, also have the longest histories of mutiny, although the problem has plagued all merchant fleets and navies. In terms of notoriety and historical significance of mutinous episodes, Great Britain is clearly the leader in the field.

The most famous mutiny in history struck the British naval fleet in 1789 on board the *H.M.S. Bounty*.¹⁴ The *Bounty* was dispatched during the autumn of 1787, under King's warrant, to the Society Islands in the South Pacific to gather bread-fruit plants which were to be returned and cultivated as a source of food in the West Indies.¹⁵ Throughout the voyage to the Society Islands, the captain, Lieutenant William Bligh, relentlessly drove the ship, crew, and officers in order to arrive in Otaheite, load the plants, and complete the return mission ahead of schedule.¹⁶

Following the loading of the bread-fruit aboard the *Bounty* at Otaheite, the vessel sailed on April 4, 1789 for the West Indies.¹⁷ On April 29, 1789, the master's mate, Fletcher Christian, unable to endure any further abusive treatment from Captain Bligh, and with the

12. See generally E. POTTER, *SEA POWER* (3d ed. 1975).

13. See *infra* notes 14-78 and accompanying text.

14. To date, three major motion pictures have been made chronicling the BOUNTY mutiny. The most recent was *The Bounty* (Metro-Goldwyn-Mayer 1982).

15. E. BENTLY, *AN ACCOUNT OF THE MUTINOUS SEIZURE OF THE BOUNTY 1* (1790). See D. HERBERT, *GREAT HISTORICAL MUTINIES* 27-120 (1876).

16. Captain Bligh put the crew on short rations of cheese during the voyage after accusing the men of stealing a cheese which he had sent to his home prior to the sailing of the BOUNTY from England. J. BARROW, *THE MUTINY OF THE BOUNTY AND THE PITCAIRN ISLANDERS* 47 (1886). Later Captain Bligh became enraged at the crew and imposed short rations based on the fact that the crew refused to exchange their biscuit ration for a ration of decayed pumpkins. *Id.* Similarly, during the voyage master's mate Fletcher Christian was accused of stealing coconuts from Captain Bligh. Bligh sternly reprimanded Christian, leaving Christian in a state of near-tears. Christian remarked to a mess-mate that he "would rather die a thousand deaths than bear this treatment." J. DEIGHTON, *supra* note 1, at 64.

17. E. BENTLY, *supra* note 15, at 1.

aid of twenty-five of the crew, seized control of the ship from Captain Bligh and the other loyal officers.¹⁸ Without firing shots, the mutiny succeeded and Captain Bligh and his loyal officers and crew were set adrift in the *Bounty's* launch with 28 gallons of water, 150 pounds of bread, some rum and wine, and minimal navigational instruments.¹⁹ Captain Bligh and his crew were able to sail their small overburdened boat approximately 3600 miles to Timor, the nearest British outpost.²⁰ Eventually, all of the mutineers, including Fletcher Christian,²¹ were either captured by the British or killed by the Otaheitians.²² Those who were tried by the British court martial at Portsmouth, England in 1792 were faced with the damning testimony of Captain Bligh, and all but three were convicted of mutiny and sentenced to death.²³

Great Britain suffered another major naval mutiny in 1797. The mutiny off the coast of Spithead was caused by the anger of seamen over poor working conditions and poorer pay.²⁴ Although soldiers in the British army had received a pay raise in 1797, sailors in the British fleet had not received an increase in pay for over 150 years.²⁵ The Channel Fleet, at anchor, suffered a well organized and widespread mutiny in response to these conditions.²⁶ When Fleet Admiral Gardner ordered the ships to sea, each in turn refused.²⁷ Two delegates from each crew were elected and the delegates then met with the Lords of the Admiralty to discuss terms for a return to duty.²⁸ After negotiations, the Lords offered a 20% pay raise to which the sailor's representatives agreed.²⁹ The sailors, however, required that the

18. *Id.* at 12. See also F. CHRISTIAN, VOYAGES AND TRAVELS OF FLETCHER CHRISTIAN AND A NARRATIVE ON BOARD HIS MAJESTY'S SHIP BOUNTY AT OTAHEITE (1798).

19. E. BENTLY, *supra* note 15, at 17. Prior to setting Captain Bligh adrift, Christian was entreated by Bligh to return to duty. Christian silenced Bligh by commanding: "hold your tongue sir or you are dead this instant." STATEMENTS OF THE LOSS OF HIS MAJESTY'S NEW SHIP THE BOUNTY 10 (T. Tegg ed. undated).

20. J. BARROW, *supra* note 16, at 54.

21. Fletcher Christian died at the hands of the Otaheitians. J. BARROW, *supra* note 16, at 146.

22. *Id.* All nine of Christian's mutineers who landed at Pitcairn's Island, the mutineers eventual home, either were murdered by the Otaheitians or died of natural causes. *Id.*

23. Three mutineers were acquitted of the charges. Three were convicted of mutiny but were pardoned by the King. Three mutineers were convicted by the court, sentenced to death, and subsequently executed. The remaining mutineers who were captured died in irons on board the H.M.S. PANDORA when that vessel was wrecked searching for the remaining mutineers. *Id.*

24. J. NEALE, THE CUTLASS AND THE LASH: MUTINY AND DISCIPLINE IN NELSON'S NAVY 165 (1985).

25. *Id.*

26. *Id.*

27. *Id.* at 166.

28. *Id.*

29. *Id.* at 166.

Lords procure from the King a pardon for every ship in the fleet.³⁰ After a conference with the government, the King signed a royal proclamation decreeing a total pardon.³¹ After approximately three weeks, the sailors had won nearly every concession that they sought.³² This "workers" strike was the largest in Britain until the dockers' strike in Britain nearly a century later.³³

The seriousness of mutiny at sea, in terms of discipline of the crew and safety of the officers in command, was underscored by the first United States naval mutiny, which occurred in 1842.³⁴ In that year the United States Navy brig *Somers* sailed from the United States to Liberia to deliver messages to the fleet off the coast of Africa.³⁵ The *Somers* was commanded by a thirty-year Navy veteran, Commander Alexander Slidell MacKenzie.³⁶ On board was a young midshipman, Philip Spencer, son of Secretary of War John C. Spencer.³⁷

During the return voyage from Africa, Midshipman Spencer plotted to seize control of *Somers*, kill the officers, and turn the ship to piracy.³⁸ Fraternizing with the common seamen, Midshipman Spencer gained support for his plot from several members of the crew.³⁹ When Captain MacKenzie learned of the plot, he ordered Spencer placed in irons.⁴⁰ Spencer's incarceration sparked continued unrest among the crew⁴¹ and soon the ship's officers uncovered a plan to free Spencer and take the ship.⁴² After placing the officers on a round-the-clock watch, Captain MacKenzie requested the counsel of his officers regarding the proper course of action in the face of mounting ten-

30. *Id.* at 168.

31. *Id.*

32. *Id.* In addition to pay improvement, 114 "unpleasant" officers were ordered to duty ashore. Additionally, conditions such as food and water rations were improved. *Id.*

33. *Id.* A similarly motivated mutiny occurred at approximately the same time in the fleet anchored off Nore. The first ship in that group to mutiny, and the last to return to duty, was the H.M.S. DIRECTOR, commanded by William Bligh of BOUNTY infamy. *Id.*

34. Duer, *The Nautilus: A Collection of Select Nautical Tales and Sea Sketches With An Authentic Narrative of the Mutiny of the Somers*, in THE NEW WORLD 40 (Jan. 1843) (available in Nimitz Library, Special Collections, U.S. Naval Academy, Annapolis, Md.).

35. Hunt, *The Attempted Mutiny on the U.S. Brig SOMERS*, U.S. NAVAL INST. PROC. 2062 (Nov. 1925).

36. Duer, *supra* note 34, at 40.

37. *Id.* Midshipman Spencer had earned a reputation as a drunkard and a troublemaker, and for this reason Commander MacKenzie sought, unsuccessfully, to have him reassigned prior to the voyage. *Id.*

38. *Id.* at 41. Spencer had discussed his plot with several members of the crew and felt certain that he would be successful if he had the support of at least 10 men. *Id.*

39. *Id.* at 42.

40. *Id.* at 43.

41. *Id.* at 44.

42. *Id.*

sion.⁴³ The officers unanimously agreed that due to the dangerous circumstances on board the vessel and the long distance to the nearest safe port, the three mutineers (Spencer and the two seamen who plotted his release) should be put to death immediately.⁴⁴ Captain MacKenzie agreed, and the three mutineers were hanged at the yard arm.⁴⁵

When the *Somers* returned to the United States, a Navy Board of Inquiry was convened which exonerated Commander MacKenzie.⁴⁶ Commander MacKenzie, however, requested a trial by court martial to ensure that no doubts remained regarding the propriety of his conduct.⁴⁷ The court martial acquitted MacKenzie of all charges, including murder and conduct unbecoming an officer.⁴⁸ In acquitting Commander MacKenzie, the court cited the danger to the ship, the officers, and the loyal crew brought by the conduct of the mutineers. The court also lauded Commander MacKenzie's reasoned use of the counsel of his brother officers through which he restored discipline and order to the ship.⁴⁹

Mutineers may have a variety of purposes for their acts. In addition to mutiny for poor treatment, better conditions, or a desire to become pirates, the conduct of mutineers may be based on politics as well. Two mutinies within the Russian fleet during this century and a third aboard a Portuguese merchant vessel demonstrate the politics of mutiny. The first of the three incidents took place within the Czarist

43. *Id.* at 45. In a letter to his officers, Captain MacKenzie stated: "I call upon you to take into deliberate and dispassionate consideration the present condition of the vessel, and the contingencies of every nature that the future may embrace throughout the remainder of our cruise, and enlighten me with your opinion as to the best course to be pursued." *Id.*

44. *Id.* The officers agreed that there was a:
full and determined intention to commit mutiny on board . . . [the] vessel of a most atrocious nature, . . . and the uncertainty to what extent they are leagued with others still at large . . . and that the lives of ourselves, and those committed to our charge requires that . . . they should be put to death, in a manner best calculated, as an example, to make a beneficial impression upon the disaffected.

Id.

45. *Id.* at 47. Commander MacKenzie also believed that because only the three mutineers (besides the officers) were capable of navigating the vessel, their deaths would put an end to the piratical plan. *Id.*

46. Hunt, *supra* note 35, at 2088.

47. *Id.* at 2089.

48. 46 C.M. REC. No. 844 (Navy 1843).

49. *Id.* "Commander MacKenzie was not bound to risk the safety of his vessel and jeopardize the lives of the loyal of his crew, in order to secure the guilty the forms of trial, and that immediate execution of the prisoners was demanded by duty and justified by necessity." *Id.* Additionally, the court found that "the conduct of Commander MacKenzie and his officers was prudent, calm, and firm, and that he, and they, honorably performed their duty to the service and their country." *Id.*

fleet on board the cruiser *Knaiaz Potemkin Tavrichesky (Potemkin)*.⁵⁰ The ostensible reason for the mutiny was the poor food that the sailors were forced to eat.⁵¹ The crew of the *Potemkin* revolted after being served maggot-infested meat in their borscht.⁵² Although at its inception the mutiny was not designed to serve political interests, it took on a political fervor as revolutionary agitators — Social Democrats — from among the crew became involved in the revolt.⁵³ On June 14, 1905, the crew revolted against the authority of the officers, killed the captain of the *Potemkin*, and formed a Committee of Control which was to oversee the operation of the vessel.⁵⁴ The *Potemkin*, the mutineers believed, would become a floating palace of democracy spreading revolution to all ports that it visited.⁵⁵

Once in control, the mutineers were undecided about where to take the ship and they sailed to Odessa, Theodosia, and Costanza, Roumania. While in Costanza, the Roumanian government offered the crew passports and safe haven. The crew, however, decided against the offer, believing it an offer to surrender.⁵⁶ By June 24, the revolutionary fervor had begun to wane and the mutineers became anxious to return to their homes in Sebastopol.⁵⁷ The mutineers allowed themselves to be captured, and of the fifty-seven mutineers returned to Russia, three were sentenced to death and 52 were imprisoned.⁵⁸ The *Potemkin* mutiny, although not initially politically motivated, became a tool of the Russian revolutionaries later to be memorialized by their success in the 1917 revolution.⁵⁹

The second politically-motivated mutiny occurred more recently within the Soviet Navy on board the frigate *Storozhevoy* in November of 1975.⁶⁰ While the ship was in the port of Riga on the Baltic Sea for ceremonies commemorating the Russian Revolution, the ship's political officer, Captain Valery Sablin, organized and led a mutiny against the officers and loyal crew members.⁶¹ Although no clear motive for

50. V. PYALL, *A FLOOD OF MUTINY* 42 (1957).

51. *Id.* at 54.

52. *Id.*

53. *Id.* at 43.

54. *Id.* at 50.

55. *Id.*

56. *Id.* at 64,65.

57. *Id.* at 67.

58. *Id.* at 67,68.

59. *Id.* at 68.

60. N.Y. Times, Feb. 10, 1985, at A15, col. 1.

61. *Id.*

the mutiny was ever disclosed,⁶² the mutineers were attempting to sail the vessel to Sweden when they were finally captured.⁶³ The Soviets were able to retake the ship only after one of the loyal sailors jumped overboard, swam ashore, and called for help.⁶⁴ Once the Soviets were notified of the mutiny, Soviet warships and warplanes were dispatched to retake the ship.⁶⁵ Following attacks by the Soviet warplanes, the mutineers gave up the attempt, suffering 15 dead in the attacks.⁶⁶ The leader of the mutiny, Captain Sablin, was captured and executed by a firing squad for his actions.⁶⁷

Third world revolutionary politics similarly have served as the basis for mutiny on board vessels. On January 23, 1961, the *Santa Maria*, a Portuguese merchant liner, was seized during the voyage from Curacao to Lisbon with over 900 passengers and crew on board.⁶⁸ The leader of the mutiny, Army captain Captain Henrique Galvao, was aided by 70 cohorts who had come aboard as passengers.⁶⁹ Captain Galvao stated that he took the vessel in the name of the Independent Junta of Liberation.⁷⁰ During the mutiny, the mutineers killed the ship's third officer and injured a crewman.⁷¹

Following a request by the Portuguese government, the United States and Great Britain agreed to aid in the search by providing naval units charged with locating the *Santa Maria* to "protect the passengers and crew on board and return the ship to its rightful owners."⁷² The United States provided its naval units pursuant to "the well defined terms of international law relating to piracy and insurrection on board ship."⁷³

62. *Id.*

63. *Id.* Sweden was considered by most Vietnam era draft evaders to be a political safe haven. Under the circumstances, it is probable that the Soviet mutineers believed that they would find safe haven there as well.

64. *Id.* The Soviet sailor was able to jump overboard before the ship left the harbor. His swim was less difficult than the task of convincing his superiors that a mutiny had occurred on a Soviet vessel. It was not until 2 hours after the STOROZHEYOV left port that the Soviets were convinced that the sailor was telling the truth and not suffering from the effects of alcohol-induced delusions. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. Van Zwanenberg, *Interference With Ships on the High Seas*, 10 INT'L & COMP. L.Q. 785, 799 (1961).

69. *Id.*

70. Captain Galvao asserted that his action was taken in support of Humberto Delgado, a Portuguese politician who had been defeated in his bid for the Portuguese presidency. Green, *The Santa Maria: Rebels or Pirates*, 37 BRIT. Y.B. INT'L L. 496, 496 (1961).

71. Van Zwanenberg, *supra* note 68, at 800.

72. *Id.* (quoting the United States response to the request).

73. *Id.*

American naval vessels located the *Santa Maria* on January 26, 1961⁷⁴ and were able to convince the mutineers to take the ship to the nearest port to permit the passengers to disembark.⁷⁵ The ship finally made port in Recife, Brazil on February 2, 1961.⁷⁶ Subsequently, Captain Galvao and his band were granted political asylum and the ship was returned to its owners.⁷⁷

The mutinies described above demonstrate that although mutinies occur for a variety of reasons, from crew mistreatment to political unrest, a mutiny on board a vessel on the high seas generally means violence and danger for the crew, and in particular, for the captain of the vessel. Further, because of the confusion generated by the forcible taking of a vessel, the mutiny may constitute a hazard to navigation for other vessels operating in the vicinity of the mutinous vessel.⁷⁸

II. MUTINY, PIRACY, AND MUNICIPAL LAW

A. *Mutiny Under Municipal Law*

Under the terms of international agreement,⁷⁹ ships on the high seas are subject to the exclusive jurisdiction of the state whose flag they fly, except where otherwise provided in international law.⁸⁰ Mutiny *qua* mutiny, an offense against the lawful authority aboard the vessel,⁸¹ has not yet been brought within the exception to the exclusive state jurisdiction and is generally punishable only as a municipal offense.⁸² Punishment for the crime of mutiny is, therefore, within the exclusive jurisdiction of the flag state unless the actions of the mutineers constitute piracy as well, in which case international law will provide a basis for jurisdiction in addition to municipal jurisdiction under the laws of the flag state.⁸³

1. *Mutiny Under the Laws of the United States*

In the United States, mutiny is defined expressly by criminal stat-

74. *Id.* at 801.

75. *Id.*

76. *Id.*

77. *Id.*

78. For instance, in the case of the Soviet STOROZHEVOY mutiny, Soviet aircraft actually attacked the wrong vessel on one of their strafing passes. The result was that 35 loyal Soviet sailors on the mistaken vessel were killed. N.Y. Times, Feb. 10, 1985, at A15, col. 1.

79. Geneva Convention on the High Seas, *supra* note 7.

80. *Id.*

81. See *supra* note 6 and accompanying text.

82. Green, *supra* note 70, at 497.

83. *Id.* See Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 272, *passim* (1988).

ute.⁸⁴ Under the statute, only crew members may be charged with mutiny.⁸⁵ Thus, in a situation similar to the *Santa Maria*⁸⁶ on board a United States flag vessel, there could be no prosecution for mutiny because the revolt was led by the passengers rather than by the crew.⁸⁷ With the exception of the crew-connection requirement, the statute prohibits removal or interference with the master in the command of the vessel, which is the typical historic fact pattern evidenced by most mutinies.⁸⁸ Persons convicted of this crime are liable for up to a \$2000 fine and/or imprisonment for up to 10 years.⁸⁹ A companion statute makes an endeavor by the crew to mutiny an offense as well.⁹⁰ Upon conviction for an endeavor to mutiny, a party is liable for a fine of up to \$1000 and/or imprisonment for up to 5 years.⁹¹

The naval forces of the United States are similarly prohibited from mutiny by the Uniform Code of Military Justice.⁹² Because strict discipline is required aboard a warship, mutinous conduct aboard naval vessels is treated more harshly than similar conduct aboard merchant vessels. Punishment for mutiny or attempted mutiny on board a naval vessel is punishable by death or otherwise as a court martial may direct.⁹³ The elements of the naval offense are similar in character to the federal civil statute.⁹⁴ Similarly, the crew-status requirement is essen-

84. 18 U.S.C. § 2193 (1982). The statute provides in relevant part:

Whoever, being of the crew of a vessel of the United States, on the high seas, . . . unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master . . . or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt and a mutiny, and shall be fined not more than \$2,000 or imprisoned not more than ten years, or both.

Id.

85. *Id.*

86. See *supra* notes 68-77 and accompanying text.

87. See *supra* note 69 and accompanying text.

88. 18 U.S.C. § 2193 (1982).

In a rare modern mutiny trial in the United States District Court in Orlando, Florida, in 1988, two sailors received consecutive life sentences for not only killing a shrimp boat captain, but injuring the first mate as well. The Judge hearing the case said that, "If this were another era, both of you would have walked the plank or hung from the highest yardarm." Wash. Post, Jan. 20, 1985, at A7, col. 1.

Although no lives were taken, the short-lived mutiny of the H.M.S. *Lothian* on September 1, 1944, has received a fair amount of publicity. The conditions precipitating the mutiny were poor living conditions on the mess deck in a sweat-box-like atmosphere and the treatment of the crew "like cattle." B. GLENTON, *X MUTINY IN FORCE* 95, 98, 101 (1986).

89. 18 U.S.C. § 2193 (1982).

90. *Id.* at § 2192.

91. *Id.*

92. Uniform Code of Military Justice, art. 94, 10 U.S.C.A. § 894 (West 1983) (Manual for Courts-Martial, U.S. (1984)) [hereinafter UCMJ].

93. *Id.*

94. Compare the UCMJ, *supra* note 92, with *supra* note 84.

tially required by the fact that the Uniform Code of Military Justice is applicable only to military members.⁹⁵

Thus, under either American military or civil statutes, a conviction for mutiny requires that the alleged mutineer attain the status of a crewmember.⁹⁶ Punishment is unavailable under the mutiny statute⁹⁷ for persons on board the ship as passengers or other non-crewmembers.⁹⁸

2. *Mutiny Under the Laws of Great Britain*

England has long recognized the impact of mutiny on the discipline and efficiency of the naval service. As early as 1688, when William and Mary ascended the thrones of England, there was a codification of the prohibition against mutiny.⁹⁹ The Mutiny Act¹⁰⁰ was passed in recognition of the fact that mutiny and desertion were two of the most serious military offenses. The Act provided for trial and punishment by court martial with a maximum punishment of death.¹⁰¹

Although the Mutiny Act was often recodified,¹⁰² there were few changes made to the substance of the Act. The current statute provides that incitement to mutiny¹⁰³ and mutiny¹⁰⁴ are punishable by a maximum term of life in prison.¹⁰⁵ These statutes only relate, however, to mutinies within the military service¹⁰⁶ and have no application to mutiny where it occurs on board a British merchant vessel. Mutiny on board a merchant vessel is encompassed under the British municipal law of piracy, which is much broader in definition under English

95. Manual for Courts-Martial, U.S. rule 202(a) (1984).

96. See *supra* notes 85 and 95.

97. See *supra* notes 85-89 and accompanying text.

98. See *supra* text accompanying note 87.

99. 1 W. & M. § 5 (1688).

100. *Id.*

101. *Id.*

102. See, e.g., The Mutiny Act, 35 Vict. ch. 3, para 15 (1872). "If any person subject to this Act shall at any time during the continuance of this Act begin, excite, cause, or join in any mutiny or sedition in any forces belonging to Her Majest[y] . . . [he shall be punished] with death." *Id.*

103. The Incitement to Mutiny Act, 37 Geo. § 70 (1797). "A person is guilty: who shall maliciously and advisedly endeavor to seduce any person serving in his Majesty's forces by sea or land from his duty and allegiance to his Majesty or to incite or stir up any such person . . . to commit an act of mutiny. . . ." *Id.*

104. *Id.*

105. *Id.*

106. See 11 CRIM. L. para. 831 n.1 (Halsbury, 4th ed. 1976) (requiring knowledge that the person incited to mutiny was a member of the military forces).

law than under international law.¹⁰⁷

3. *Definitional Ambiguities*

Some definitions of piracy are broad enough to cover robberies as well as other acts of either violence or depredation that are committed on board a merchant ship on the high seas by either a passenger or a crew member not in control of the ship; and, interestingly, mutiny on the high seas has also been included.¹⁰⁸ As to this latter inclusion, however, the great weight of authority is against the extension of the common jurisdiction of states to cover those offenses committed exclusively on a ship "which by international law is under the excluding jurisdiction of a state whose flag it flies."¹⁰⁹ Accordingly, even with a successful mutiny, common jurisdiction would not be recognized as attaching.¹¹⁰ If, however, the successful mutineers proceed to dedicate the ship to continued acts of either violence or depredation on the high seas or in foreign territories, then such jurisdiction should attach, with the ship being viewed properly as a pirate ship.¹¹¹

B. *Piracy Under Municipal Law*

1. *Piracy Under the Laws of the United States*

Piracy, as a crime under the municipal laws of the United States, has been considered by both Congress¹¹² and the courts¹¹³ throughout the history of the United States. Congress, in June, 1948, enacted a federal law prohibiting piracy.¹¹⁴ Under the terms of the Act, Congress made punishable, by life imprisonment, the crime of piracy "as defined by the law of nations,"¹¹⁵ thus incorporating the international law of piracy into the laws of the United States. Of course, the adoption of a system of law that encompasses both treaty law and customary international law, without further definition, makes difficult an understanding of what acts constitute the municipal crime of piracy

107. See *infra* notes 123-137 and accompanying text.

108. *Id.* at 809, 810.

109. *Id.* at 810.

110. *Id.*

111. *Id.*

112. See *supra* note 110 and accompanying text.

113. See *infra* notes 145-48 and accompanying text. See also, Lenoir, *Piracy Cases in the Supreme Court*, 25 J. CRIM. L. & CRIMINOLOGY 532 (1934).

114. Ch. 81, 62 Stat. 774 (1948) (codified as amended at 18 U.S.C. § 1651 (1982)).

115. 18 U.S.C. § 1651 (1982). The revisers of the statute noted that "the law of piracy is deemed to require a fundamental reconsideration and complete restatement, perhaps resulting in drastic changes by way of modification and expansion. . . . It is recommended . . . [that] the subject of piracy be entirely reconsidered. . . ." *Id.* (revisers' note).

insofar as treaty law and customary international law are inconsistent.¹¹⁶ The vagueness of the definition of piracy becomes apparent when the sources of international law are substantively considered.

Under what some commentators view as the generally accepted understanding of the Geneva Convention on the High Seas, (April 29, 1958),¹¹⁷ piracy encompasses only acts by one ship against another.¹¹⁸ Under this formulation, an internal seizure of a ship by passengers or crew therefore might not meet the definition of piracy under the Geneva Convention, which suggests that acts directed against another ship are required. Because an internal seizure of a ship may not be piracy under the terms of international agreement, the international agreement may be inapposite as a basis on which to support a charge of piracy under the federal statute.

Customary international law, as interpreted by the United States Supreme Court, however, may encompass acts of mutiny within the definition of piracy. In *United States v. Klintock*,¹¹⁹ the Court held that mutiny and murder committed by a crew constituted piracy, even where no other vessel was involved and where no theft was committed.¹²⁰ Although *Klintock* has never been overruled, the fact that the

116. Compare *infra* text accompanying notes 162-88 with *infra* text accompanying notes 189-219.

Because of the Constitution's delegated power to Congress, "to define and punish piracies and felonies committed on the high seas and offenses against the law of nations," it has been assumed that no individual state within the United States can seek to exercise jurisdiction to punish piratical acts. Art. I, § 8, cl. 10. See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404, reporter's note 2 at 257 (1987).

117. Geneva Convention on the High Seas, *supra* note 7, art. 15.

118. See *id.*; see also *infra* notes 194-97 and accompanying text. The Third Restatement of Foreign Relations Law confers upon states jurisdiction to define and to prescribe punishment for those offenses that the world community of nations recognizes as being of universal concern — and, more specifically, piracy, slave trade, attacks on or hijacking of aircrafts, war crimes, genocide and certain acts of terrorism. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1987).

The Restatement further updates the elements of piracy by acknowledging that not all acts of violence committed on the high seas are piratical. Specifically, only the following are regarded as within the scope of piracy:

- (i) Any illegal acts of violence, detention, or depredation committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed against another ship or aircraft on the high seas, or against persons or property on board such other ship or aircraft, or against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state;
- (ii) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (iii) Any act of inciting or of intentionally facilitating an act described in subparagraphs (1) or (2).

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 522 comment (c) at 84 (1987).

119. 5 U.S. (Wheat.) 144 (1820).

120. *Id.* at 152.

piracy statute has changed over time¹²¹ and that few piracy cases have come before the Court in recent years suggests that the continued vitality of the decision is questionable. The case remains, however, an unequivocal statement that mutiny by a crew constitutes piracy under federal law.¹²²

2. Piracy Under the Laws of Great Britain

Like the United States, Britain has a long tradition as a merchant and naval power. Britain, again like the United States, has codified the prohibition against piracy in its municipal laws and British courts have had ample opportunity to construe the various codifications of the Piracy Act.¹²³

The first Piracy Act was codified in 1698,¹²⁴ with subsequent recodifications and amendments in 1721,¹²⁵ 1837,¹²⁶ and 1850.¹²⁷ Under the provisions of these Acts, piracy included any act of revolt or endeavor to revolt against the lawful authority of the master of a vessel.¹²⁸

Decisions of British courts have construed the Acts as requiring no further acts of piracy in addition to an onboard revolt; the revolt itself is considered to be piracy.¹²⁹ In a recent case, *Cameron v. H. M. Advocate*,¹³⁰ the Court of Justiciary upheld a Scotland Court of Session decision that held that mutiny constituted an act of piracy.¹³¹ In *Cameron*, the crew of a British ship mutinied at sea near the coast of Scotland.¹³² The crew placed the master in restraint and then converted the ship to their own uses.¹³³ The trial court charged the jury that a felonious taking of a ship from those in lawful authority by means of threats or violence constituted piracy *jure gentium*¹³⁴ rather

121. The changes, however, have not been significant. Since 1819, piracy has been defined by federal statutes in terms of "the laws of nations." See Act of 3 March 1819, ch. 77, 3 Stat. 510 (1819).

122. See *supra* notes 119-120 and accompanying text. See also, *Piracy in Modern International Law*, 43 TRANS. GROT. SOC'Y 63 (1957).

123. The Piracy Act, 11 Will. § 3 (1698).

124. *Id.*

125. The Piracy Act, 8 Geo. § 24 (1721).

126. The Piracy Act, 7 Will. § 4 & 1 Vict. § 88 (1837).

127. The Piracy Act, 13 Vict. § 26 (1850).

128. 11 Will. § 3 (1698).

129. *Regina v. Hastings & Meharg*, 1 Mood. C.C. 82 (1825).

130. [1971] S.C. 50.

131. *Id.* at 61.

132. *Id.* at 53.

133. *Id.* at 53-54.

134. Piracy *jure gentium* refers to piracy in violation of the laws of nations.

than piracy in violation of British municipal law.¹³⁵ On appeal, the Court of Justiciary held that the facts supported a jury finding that the acts were in violation of the municipal law, notwithstanding the jury charge, and affirmed the decision.¹³⁶ Thus, under recent pronouncements of the British courts, the municipal laws of Great Britain continue to support convictions for piracy where the underlying acts are mutinous, even absent other acts of piracy such as murder and robbery.¹³⁷

3. *Pirates — Myth and Reality*

The pirates of old have been complemented and oftentimes replaced by privateers, crusaders, French *corsarios luternos*, bucaniers and — more recently — hijackers.¹³⁸ As a word, “pirate” derives from the Greek, *peiram*, which means attempt to attack.¹³⁹ As early as 594 B.C., the Greek Laws of Solon presented evidence that associations of pirates were in fact authorized legally.¹⁴⁰ Owing to the fact that the Greek city states were not able financially to organize and maintain regular navies, pirates were relied upon to fight for the city-states for a stipulated commission.¹⁴¹ The merchant who would find his goods stolen, was allowed — legally — to undertake a reprisal for the estimated value of his missing cargo.¹⁴² Often, haste was of the essence and the wronged merchant would not wait for his license or commission to be issued.¹⁴³ Rather, “many merchant vessels habitually combined trade with plunder as the only really effective insurance policy,” and this in turn gave rise to the establishment of the privateering system.¹⁴⁴ Both the employers’ and the employees’ shares of the anticipated *bounty*, or loot, were set before a voyage was ever under-

135. [1971] S.C. at 61.

136. *Id.*

137. See *supra* notes 128-134 and accompanying text. Similarly, French law includes, within the definition of piracy, a seizure of a French ship by a crew member that is accomplished either by fraud or violence. The Act specifically encompasses, within the definition of a pirate, a crewmember of a French warship who mutinies and takes control of the ship. C. Pen. art. 748 (77th

138. D. MITCHELL, *PIRATES* 12 (1976). See generally Dickinson, *Is the Crime of Piracy Obsolete?* 32 HARV. L. REV. 334 (1925).

139. *Id.* at 11.

140. J. CABAL, *PIRACY AND PIRATES* 11 (J. Cleugh transl. 1953). Interestingly, Homer wrote freely of piracy in the *Odyssey* and Achilles, the most famous hero of the *Iliad*, is acknowledged as a pirate. D. HERBERT, *GREAT HISTORICAL MUTINIES* 12, 13 (1876).

141. D. MITCHELL, *supra* note 138, at 111.

142. *Id.*

143. *Id.*

144. *Id.* Also, Spain chose not to distinguish between privateers and pirates. *Id.* at 16.

taken — but cheating was still a common practice.¹⁴⁵

Although letters of reprisal or *marque* were issued in England during the thirteenth century, the next four hundred years saw the boundaries between legitimate trade, reprisal, and piracy blurred to the point of indistinguishability.¹⁴⁶ Thus, one person could well find himself classified on different occasions as a trader, fisherman, pirate *or* member of a local navy!¹⁴⁷ Accordingly, Francis Drake — while considered a pirate by the Spanish — was a hero to the English and John Paul Jones was held to be a pirate by the English but a hero by the Americans.¹⁴⁸

Toward the end of the seventeenth century, pirates went largely unchecked. The beginning of the eighteenth century saw an even more motley group of adventurers disrupting ocean traffic along the English, Scotch and Welsh borders, the shores of the North American colonies and plantations, and the islands of the West Indies. Even in the Far East, the pirates of fiction gave rise to romantic pirates of fact and such names as Captain Kidd, Captain Teach (Bartholomew Roberts), Mary Read and Ann Bonny have been immortalized in the annals of piracy.¹⁴⁹

The decline of piracy has been attributed to several reasons: the abolition of privateering and the slave trade; the evangelization of the masses; the tax on gin; the industrial revolution (with the production of steel and steam ships); social reform that gave rise to better pay and working conditions in both the navy and merchant marines; and the use and development of telegraphic communication.¹⁵⁰

4. *Jurisdictional Bases*

The concept of "free" seas has been expanded and restricted over the years as political, social and economic vagaries dictated.¹⁵¹ Troubled domestic and international waters were initially regulated by common law and were later placed within the purview of that body of

145. *Id.* at 11, 12.

146. *Id.*

147. *Id.*

148. *Id.* at 16.

149. A. HURD, *THE REIGN OF PIRATES* 5-9 (1925). See generally, E. SNOW, *MUTINY AND MURDER* (1959); C. JOHNSON, *THE HISTORY OF THE LIVES AND ACTIONS OF THE MOST FAMOUS HIGHWAYMEN, STREETROBBERS, ETC., TO WHICH IS ADDED A GENUINE ACCOUNT OF THE VOYAGES AND PLUNDERS OF THE MOST NOTED PIRATES* (1814).

150. Mitchell, *supra* note 132, at 185.

151. G. SMITH, *RESTRICTING THE CONCEPT OF FREE SEAS: MODERN MARITIME LAW RE-EVALUATED* (1981). See Smith, *The Concept of Free Seas: Shaping Modern Maritime Policy Within a Vector of Historical Influence*, 11 INT'L LAWYER 355 (1977).

law designated admiralty or maritime that — in turn — have presented over the years equitable jurisdictional challenges and intrusions into the original jurisdictional base.¹⁵² Municipal law and international law have also been at odds with each other regarding the scope and enforcement of laws against piracy.¹⁵³ This situation exists in no small part because of the difference accorded piracy under the law of nations and piracy under municipal law.¹⁵⁴ A clear distinction has not always been maintained between piracy in its strictest sense — defined by international law — and piracy as it arises under the private laws and treaties of individual states.¹⁵⁵ "International piracy is committed beyond all territorial jurisdiction. Municipal law piracy may include offenses committed in the territory of the states."¹⁵⁶ The essence of international piracy, then, is that it is "an act of violence, committed at sea or at any rate closely connected with the sea, by persons not acting under proper authority."¹⁵⁷

The failure to discern a settled law of nations for piracy, together with a lack of adjudicated cases, adds to the state of chaos that has long existed in the field.¹⁵⁸ The reason for this paucity of international case authority and modern state practice can be better understood

152. F. WISWALL, *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800: AN ENGLISH STUDY WITH AMERICAN COMPARISONS* (1970); Smith, *Equity and Admiralty: A Turbulent Path to Manifest Destiny*, 5 NW. U. J. INT'L L. & BUS. 65 (1983). See Dickinson, *supra* note 138, at 339, 358; Lenoir, *supra* note 113, at 535. See generally, Smith, *The Politics of Lawmaking: Problems in International Maritime Regulation — Innocent Passage v. Free Transit*, 37 PITT. L. REV. 387 (1976); Smith, *Apostrophe to a Troubled Ocean*, 5 IND. L. REV. 267 (1972); and Dickinson, *supra* note 138, *passim*.

153. Dickinson, *supra* note 138, at 339, 358. See W. BISHOP, JR., *INTERNATIONAL LAW: CASES AND MATERIALS* 461, 555, 556 (3rd ed. 1971).

154. *Harv. Research in Int'l Law, Piracy*, 26 AM. J. INT'L L. SUPP. 739, 749 *passim* (1932).

155. *Id.*

156. *Id.*

157. *Id.* at 750. Sir Leoline Jenkins, a Judge of the Court of Admiralty in seventeenth century England, defined piracy — through a charge to the Grand Jury at an Admiralty session — thusly:

The next sort of offenses pointed out in the statute are robberies; and a robbery, when it is committed upon the sea, is what we call *piracy*. A robbery, when it is committed upon the land, does imply three things: (1) that there be a violent assault; (2) that a man's goods be actually taken from his person or possession; (3) that he who is despoiled be put in fear thereby. When this is done upon the sea, when one or more persons enter on board a ship with force and arms, and those in the ship have their ship carried away by violence, or their goods taken away out of their possession, and are put in fright by the assault, this is *piracy*; and he that does so is a *pirate* or a *robber* within the statute. Nor does it differ the case though the party so assaulted and despoiled should be a foreigner, not born within the King's allegiance; if he be *de amicitia Regis* he is *eo nomine* under the King's protection, and to rob such a one upon the seas is *piracy*. Nor will it be any defense to a man, who takes away by force another's ship or goods at sea, that he hath a commission of war from some foreign prince, unless the person he takes from be a lawful enemy to that prince. . . .

LIFE OF SIR LEOLINE JENKINS, *id.* at 94; see also Baker, *A Charge at an Admiralty Sessions, with notes*, 257 LAW MAG. AND REV. 412.

158. *Harv. Research in Int'l Law, Piracy*, 26 AM. J. INT'L L. SUPP. 764 (1932).

when it is remembered that "classical" piracy disappeared many years ago and that its contemporary application on or over the high seas is sporadic — except in rather specifically-delimited areas that are bordered by states who have no adequate naval forces to engage in combat for it.¹⁵⁹

Piracy lost its great importance in the law of nations before the modern principles of finely discriminated state jurisdictions and of freedom of the seas became thoroughly established. Indeed, the former prevalence of piracy may be assigned as a principal cause of the old reluctance of states to accept the doctrine of the freedom of the seas.¹⁶⁰

Piracy remains, nonetheless, a significant topic for international study, concern and agreement "because it furnishes an extraordinary basis of *common* jurisdiction — a special basis consisting of the nature and locality of the offense — which cannot be enlarged by the separate action of a state on its own behalf."¹⁶¹

III. MUTINY, PIRACY AND INTERNATIONAL LAW

A. Customary International Law

The question of whether mutiny constitutes an offense against international law has often been considered by international legal scholars, yet no clear consensus has emerged. What is clear is that there is no international prohibition against mutiny *qua* mutiny.¹⁶² In general, mutiny is considered only a municipal crime subject to the jurisdiction of the courts of the flag nation.¹⁶³

In contrast, piracy is considered to be an offense both against municipal law¹⁶⁴ and international law,¹⁶⁵ punishable by both the flag nation and any state that obtains *in personam* jurisdiction over the mutineers.¹⁶⁶ The question of whether mutiny constitutes a crime against the laws of nations thus depends upon whether mutiny is considered to be piracy.¹⁶⁷ If mutiny is piracy, then it is punishable by any nation that obtains jurisdiction.¹⁶⁸ If, however, the definition of

159. *Id.*

160. *Id.*

161. *Id.* at 782.

162. See Green, *supra* note 70, at 497.

163. See *id.*; see also 2 D. O'CONNELL, *THE INTERNATIONAL LAW OF THE SEA* 966-67 (I. Shearer ed. 1984).

164. See *id.* at 966-67.

165. *Id.* Practically, however, municipal law was the only "real" proscription against piracy because there was no effective international tribunal to punish the crime. *Id.* at 967.

166. *Id.*

167. See *infra* notes 170-78 and 202-20 and accompanying text.

168. D. O'CONNELL, *supra* note 163, at 966; see also 1 C. HYDE, *INTERNATIONAL LAW*

piracy does not subsume mutinous conduct, then under the doctrine of territoriality of vessels,¹⁶⁹ the flag nation is the sole competent authority to bring the mutineers to justice.

Lauterpacht is the leading commentator supporting the view that a mutiny by crew or passengers constitutes piracy, subject to the law of nations.¹⁷⁰ In his treatise on international law, he stated that a mutinous seizure of a ship by passengers or crew constituted piracy, if the mutineers converted the ship to their own use¹⁷¹ and if the mutinous acts took place on the open sea.¹⁷² Lauterpacht noted that the situs of open sea was required because a pirate ship constitutes a hazard to navigation to all ships on the open sea.¹⁷³ Thus, any nation which gains control of the pirates may punish them.¹⁷⁴

Other commentators have taken the opposite view. Professor Hyde included within the definition of piracy only acts of homicide, robbery, or burning directed either by the crew toward the officers or master of the vessel or against another vessel.¹⁷⁵ The act of revolt, under Hyde's formulation, without more, was insufficient on which to base a charge of piracy.¹⁷⁶ Similarly, Professor Hall included revolt by the crew within his definition of piracy only where accompanied by robbery or attempted robbery of a vessel on the open sea.¹⁷⁷ Under these formulations, it is the theft or other depredation rather than the

CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 231, at 768-69 (2d ed. 1945).

169. The doctrine of territoriality of ships states that a "ship [is] a legal enclave in its own right, a piece of peripatetic national territory. . . ." D. O'CONNELL, *supra* note 163, at 735. The territoriality doctrine breaks down, however, where the ship enters territorial waters of another nation. In such territorial waters, the sovereign in control of the territorial waters has primary jurisdiction over crimes aboard ship while the ship is in territorial waters. The flag state may exercise jurisdiction when the sovereign in control of the territorial waters declines to do so. See *Wildenhuis's Case*, 120 U.S. 1 (1887).

170. See H. LAUTERPACHT, 1 OPPENHEIM'S INTERNATIONAL LAW § 272, at 608-09 (1955). The author suggests that a true definition of piracy would include "every unauthorized act of violence against persons or goods committed on the open sea either by a private vessel against another vessel or by a mutinous crew or passengers against their own vessel." *Id.* at 609 (footnote omitted).

171. *Id.* at 609.

172. *Id.* § 277, at 615.

173. *Id.* "Piracy is, and always has been, a crime against the safety of traffic on the open sea, and therefore it cannot be committed anywhere else than on the open sea." *Id.* (footnote omitted).

174. *Id.* § 278, at 616. "Every maritime State has, by a customary rule of the Law of Nations, the right to punish pirates." *Id.* The United States Court of Appeals for the Eleventh Circuit affirmed a conviction grounded in piracy, for the unlawful taking of a vessel in 1983 with the case of *United States v. Larry M. Crews*, 695 F.2d 519 (11th Cir. 1983).

175. See C. HYDE, *supra* note 168, at 771.

176. See *id.* at 771 n.4.

177. W. HALL, A TREATISE ON INTERNATIONAL LAW 271 (Higgins ed. 1917).

revolt that is considered piracy.¹⁷⁸

The commentators all agree, however, that the acts constituting piracy must be done for personal rather than for a political or public purpose.¹⁷⁹ Thus, under the weight of authority, the mutineers involved in the *Santa Maria*¹⁸⁰ and *Potemkin*¹⁸¹ mutinies should not have been regarded as pirates because their activities were of a political nature.¹⁸² Indeed, in the case of the *Santa Maria*, the mutineers were offered safe haven in Brazil because of their political leanings.¹⁸³ Similarly, the mutineers on the *Potemkin* were offered political asylum in Romania.¹⁸⁴ It was only after the *Potemkin* crew's refusal of asylum and their return to Russia that they were punished for their actions as mutineers in violation of Russian municipal law.¹⁸⁵

The foregoing illustrates the divergent views of commentators regarding whether mutiny, a revolt against the lawful authority aboard a vessel, constitutes an act of piracy punishable under customary international law. Under either formulation, such an outcome-determinative test would appear to forestall any attempt to establish an international legal norm which would be applied with certainty in every case. Depending upon which nation first obtained jurisdiction over a mutinous vessel and crew and the formulation of piracy that that nation chose to adopt, the crew might or might not be subject to punishment for their actions. A mutinous seizure of a vessel "from within" subjects other vessels in the vicinity to a danger equal to that arising where the seizure is made from another vessel.

Similarly, all nations have an equal stake in ensuring the freedom of safe navigation of the seas, regardless of whether the seizure of a vessel occurred from within or without the vessel. Therefore, from the standpoint of securing freedom of safe navigation of the seas, the Lauterpacht formulation, that mutiny is within the definition of piracy,¹⁸⁶ would appear to further the establishment of an international legal

178. *Id.*

179. See W. HALL, *supra* note 177, at 274; C. HYDE, *supra* note 168, at 772; H. LAUTERPACHT, *supra* note 170, at 610.

180. See *supra* notes 68-77 and accompanying text.

181. See *supra* notes 50-59 and accompanying text.

182. The *Santa Maria* involved the mutiny led by a follower of an unsuccessful presidential aspirant. See *supra* note 70 and accompanying text. The *Potemkin* involved mutinous and revolutionary activities that led to the overthrow and murder of the captain of the vessel and appointment of a Committee of Control which was to democratically run the vessel. See *supra* note 54 and accompanying text.

183. See *supra* note 76 and accompanying text.

184. See *supra* note 56 and accompanying text.

185. See *supra* note 58 and accompanying text.

186. See *supra* notes 170-74 and accompanying text.

norm. The international convention¹⁸⁷ that considered the law of piracy in conjunction with the codification of the law of the sea, however, left the true sweep of the prohibition — a significant question of interpretation — unclear: on the one hand, the inclusive interpretation suggested by Lauterpacht; and on the other, the narrow view suggested by Hyde and Hall.¹⁸⁸

B. Geneva Convention on the High Seas

The control of the seas and concomitant control over fishing, navigation and extraction of minerals has been a source of tension between nations for centuries.¹⁸⁹ Customary rules of international law were, over time, established, and since 1930 there has been an effort to codify the international law of the High Seas.¹⁹⁰ In 1958, the Geneva Convention on the High Seas was signed by United Nations participants establishing the first codification of the law of the sea.¹⁹¹

One of the problems that the Geneva Convention dealt with was the crime of piracy as defined by international law.¹⁹² The Convention

187. See generally Geneva Convention on the High Seas, *supra* note 7; see also *infra* notes 161-90 and accompanying text.

188. See *supra* notes 175-78 and accompanying text.

189. J. SWEENEY, C. OLIVER & N. LEECH, CASES AND MATERIALS ON THE INTERNATIONAL LEGAL SYSTEM 145 (2d ed. 1981) [hereinafter J. SWEENEY].

190. *Id.*

191. See generally Geneva Convention on the High Seas, *supra* note 7.

192. *Id.* art. 15. The following eight articles relating to piracy are those found in the 1958 Convention on the High Seas that emerged from the first United Nations Conference on the Law of the Sea:

Article 14

All States shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State.

Article 15

Piracy consists of any of the following acts:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

(a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.

Article 16

The acts of piracy, as defined in article 15, committed by a warship, government ship or government aircraft whose crew has mutinied and taken control of the ship or aircraft are assimilated to acts committed by a private ship.

Article 17

A ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 15. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

Article 18

provided that piracy was a crime in international law punishable by "every State."¹⁹³ Article 15 of the convention defines the crime of piracy as the commission of:

(1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or passengers of a private ship . . . directed (a) On the high seas against another ship . . . or against persons or property on board such ship . . . (b) Against a ship or . . . persons or property in a place outside the jurisdiction of any State."¹⁹⁴

Under article 15(1)(a), the definition of piracy clearly encompasses acts of piracy by a ship committed against another ship.¹⁹⁵ Under this subsection, the definition of piracy does not include an internal mutiny or seizure of a vessel by the crew or passengers.¹⁹⁶ Only where such a ship under the control of mutineers later attacked another ship, committing robbery or other acts of depredation, would article 15(1)(a) provide a basis for imposing international law jurisdiction permitting a seizure of the pirate vessel and its crew by "every State."¹⁹⁷

The meaning of the second subsection of article 15(1) has led to considerable disagreement among commentators regarding its scope of coverage.¹⁹⁸ Under the terms of article 15(1)(b), any "illegal act of

A ship or aircraft may retain its nationality although it has become a pirate ship or aircraft. The retention or loss of nationality is determined by the law of the State from which such nationality was derived.

Article 19

On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

Article 20

Where the seizure of a ship or aircraft on suspicion of piracy has been effected without adequate grounds, the State making the seizure shall be liable to the State the nationality of which is possessed by the ship or aircraft, for any loss or damage caused by the seizure.

Article 21

A seizure on account of piracy may only be carried out by warships or military aircraft, or other ships or aircraft on government service authorized to that effect.

193. *Id.* art. 19.

194. *Id.* art. 15 (emphasis added).

195. *Id.* See also *supra* text accompanying note 196.

196. The text of Article 15(1)(a) requires a violent act directed at "another vessel." Geneva Convention on the High Seas, *supra* note 7, art. 15(1)(a).

Remedies in tort or restitution are not precluded under International Law for victims of piracy. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 comment b.

197. *Id.* While recognizing the "complete immunity" for warships or other ships used by a state for non-commercial services on the high seas from interference by other states, the Third Restatement of the Law of Foreign Relations provides that, "a warship or clearly-marked law enforcement ship of any state may board such a ship if authorized by the flag state, or if there is reason to suspect that the ship (has) is engaged in piracy, slave trade or unauthorized broadcasting. . . ." *Id.* § 522.

198. See *infra* notes 199-220 and accompanying text.

violence against a ship . . . outside the jurisdiction of any State" is regarded as piracy.¹⁹⁹ Thus, the language of the second subsection, leaving out the requirement for another vessel, suggests that an internal mutiny and seizure would qualify as piracy, punishable under the law of nations.²⁰⁰

There is a general disagreement among commentators about the meaning and scope of article 15(1)(b).²⁰¹ The drafters of an earlier unsuccessful attempt to codify the international law prohibiting piracy, the Harvard Draft Convention on Piracy,²⁰² suggested that piracy under international law did not include acts occurring entirely aboard one ship because the flag nation would have exclusive jurisdiction by virtue of the doctrine of territoriality of vessels.²⁰³

More recently, the International Law Commission, in 1956, reported that acts committed on board a vessel by the crew or passengers could not be regarded as piracy.²⁰⁴ The Commission explained that article 15(1)(b) referred to *terrae nullius*, or territory under the law of no nation, which is a unique locational construction that would appear to apply only to acts committed in the waters surrounding the continent of Antarctica.²⁰⁵

At the Geneva Convention, China proposed an amendment to article 15 that would have specifically stated that mutinous conduct was considered within the definition of piracy, but the Chinese delegation later withdrew the amendment without discussion.²⁰⁶ Absent an articulation of a reason for the proposal of such an amendment, it would be improper to conclude that the amendment was proposed because the subsection did not encompass an on-board mutiny and seizure. Indeed, an equally plausible reason for the amendment might have been to merely clarify the subsection so as to leave no doubt that internal ship seizures were to be encompassed within the international law of piracy.

More recently, the International Law Association²⁰⁷ adopted a view that specifically included within the definition of piracy acts of

199. Geneva Convention on the High Seas, *supra* note 7, art. 15(1)(a).

200. See *infra* notes 204-19 and accompanying text.

201. See *infra* notes 202-209 and accompanying text.

202. *Harvard Draft Convention on Piracy*, 26 AM. J. INT'L L. 739 (Supp. 1932).

203. *Id.* at 742.

204. *Annual Report of the International Law Commission*, [1956] 2 Y.B. INT'L L. COMM'N 282.

205. *Id.*

206. 4 Official Records of the United Nations Convention on the Law of the Sea at 84 (1959); see also D. O'CONNELL, *supra* note 163, at 971.

207. Report of the 54th Conference of the International Law Association 706 (1970).

mutiny occurring on board a vessel whether perpetrated by crew or passengers.²⁰⁸ The reporter to the Association noted that any definition that required an attack from one vessel to another was too restrictive in scope.²⁰⁹ Interestingly, the 1982 United Nations Convention on The Law of The Sea and the specific references to Articles 100, 101 and 105 dealing with piracy, repeat Articles 14, 15 and 19 of The 1958 Convention on the High Seas.²¹⁰

Because there is no authoritative statement by the drafters of article 15 regarding the scope of subsection (1)(b) and because under customary international law a mutinous seizure of a vessel was considered piracy,²¹¹ it is reasonable to conclude that article 15 was intended to codify the customary international law of piracy. Without an authoritative statement to the contrary, the best interpretation of the subsection would be that which gives effect to the customary international rules of conduct.

One court has considered the issue of whether article 15(1)(b) included within its definition of piracy an internal ship seizure. In *Cameron v. H.M. Advocate*,²¹² the defendant appealed a conviction for piracy based on his act of mutiny. The defendant argued that article 15(1)(b) did not include within its scope mutinies or internal seizures by the crew.²¹³ The defendant argued that this interpretation had been incorporated within Scottish law excluding from consideration any other definitions of piracy.²¹⁴ The Court of Justiciary held that regardless of whether consistent with the Geneva Convention or not, the acts of alleged mutiny constituted piracy under the common law.²¹⁵ Thus, the court considered the definition of piracy under article 15 without deciding its true scope and rested its decision instead on common law principals.

The argument in *Cameron*, that customary international laws and municipal laws inconsistent with codified international law are void is, at least facially, meritorious. Such a rule requires, however, that the customary international or municipal law be inconsistent in fact with

208. *Id.* at 709.

209. *Id.* at 810.

210. U.N. Doc. A/Conf. 62/122 (1982); reprinted in 21 INT'L LEGAL MATERIALS 1261 *passim* (July 1982).

211. See *supra* notes 170-74 and accompanying text; cf. 175-78 and accompanying text.

212. [1971] S.C. 50. For a more extensive discussion of the *Cameron* facts, see *supra* text accompanying notes 154-60.

213. [1971] S.C. at 61.

214. *Id.*

215. *Id.*

the codified provision.²¹⁶ In the case of article 15(1)(b), there appears no inconsistency on which to base such a finding. Article 15(1)(b) does not exclude internal seizures from the scope of its definition. Indeed, the definition includes "any act of violence . . . [a]gainst a ship, persons or property in a place outside the jurisdiction of any State."²¹⁷ Without language suggesting that internal seizures are not within the scope of the article, a more reasonable construction would be to give the article an effect that does not conflict with the established customary international law.

Opponents of such a construction raise the argument that an internal seizure is a matter within the exclusive jurisdiction of the flag state under the doctrine of territoriality of vessels.²¹⁸ As was suggested in Section IIIA above, the purpose of outlawing piracy is to protect sea commerce from the navigational hazards posed by pirates.²¹⁹ Whether an attack comes from within the vessel or from without, navigation and commerce are equally at risk and the international interest in safe navigation requires that "every State" be extended jurisdiction to capture and punish pirates. The paramount interest in securing safe international navigation on the high seas would therefore justify a limited restriction of state sovereignty over flag nation vessels. Further, because mutiny and piracy occur so infrequently, such a construction is likely to have minimal effect on national sovereignty.

IV. MUTINY AND EXTRADITION

The split in authority over whether mutiny and internal seizure are encompassed within the definition of piracy *jure gentium* may be of little practical import. Mutiny is universally regarded as a crime violative of municipal law.²²⁰ Under the terms of most extradition treaties, mutiny is specifically enumerated as an offense which subjects the actor to extradition.²²¹ Thus, with only minor exceptions,²²² jurisdic-

216. See Lukashuk, *Sources of Present-Day International Law*, in CONTEMP. INT'L L. 164 (1969). "For historical reasons, custom predominated in the past. In the last half century the situation has changed and it has been relegated to second place by treaty." *Id.* at 174. Cf. *Reid v. Covert*, 354 U.S. 1 (1957). "[A]n Act of Congress . . . is on full parity with a treaty, and . . . when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null." *Id.* at 18.

217. Geneva Convention on the High Seas, *supra* note 7, art. 15(1)(b).

218. See *supra* note 169 and accompanying text.

219. See *supra* notes 186-88 and accompanying text.

220. See *supra* note 83 and accompanying text; see also D. O'CONNELL, *supra* note 163, at 970-71.

221. See J. SWEENEY, *supra* note 189, at 138-39.

222. For a discussion of the exceptions, see *infra* text accompanying notes 223-30.

tion over mutineers may be asserted via the mechanism of an extradition treaty.

Of course, practical problems with extradition treaties may make this alternative untenable. First, extradition treaties are binding only where they exist.²²³ If State A and State B do not have an extradition treaty in force, then there is no treaty basis upon which State A may request extradition from State B. In such a case, diplomatic negotiations would be the only means of securing the extradition of mutineers.

Second, even where an extradition treaty is in force between two nations, most extradition treaties provide for an exception to extradition under the treaty where the acts constituting the offense are of a political nature.²²⁴ In such cases, extradition is generally denied.²²⁵ For example, if an extradition treaty existed and an extradition request had been made in the case of the *Potemkin* or *Santa Maria* mutinies, it is unlikely, because the mutinies were politically motivated,²²⁶ that the nation requested to extradite the mutineers would have done so. Conversely, the *Bounty* and *Somers* mutineers would have been expected to have been extradited because their crimes were motivated not by political reasons, but by self-interest.²²⁷

The political acts exception to extradition treaties is similar in character to the requirement, within the international law of piracy, that the acts of piracy be done for private rather than public reasons.²²⁸ Under both customary international law²²⁹ and the Geneva Convention,²³⁰ to be guilty of piracy, the acts must be done for private, non-public reasons. Again, in the cases where mutinies were undertaken for political reasons and the mutiny otherwise qualified as piracy under international law, there was a lack of private motivation needed to characterize the acts as piracy under the law of nations. Thus, in cases where a seizure of a vessel was undertaken for political reasons, jurisdiction would not obtain either through the international law of piracy or through the mechanism of an extradition treaty. Where the acts were done for private reasons, as in the case of the *Bounty* and

223. See J. SWEENEY, *supra* note 189, at 138.

224. See, e.g., *In Re Meunier*, [1894] 2 Q.B.D. 415; *State v. Schumann*, 39 INT'L L. REP. 433 (1970) (Ghana, Court of Appeal of Accra 1966); *Public Prosecutor v. Zind*, 40 INT'L L. REP. 214 (Italy, Court of Cassation 1961).

225. See generally *State v. Schumann*, 39 INT'L L. REP. 433 (1970).

226. See *supra* text accompanying notes 50-78.

227. See *supra* text accompanying notes 14-23, 34-49.

228. See H. LAUTERPACHT, *supra* note 170, at 609.

229. *Id.*

230. See Geneva Convention on the High Seas, *supra* note 7, art. 15.

Somers mutinies, jurisdiction would be available under the terms of an extradition treaty, if one existed, or under the International Law, if the Lauterpacht formulation of piracy, as including internal seizures, was adopted.

V. CONCLUSION

Both mutiny and piracy have been outlawed by the municipal laws of all civilized nations. Piracy is universally recognized as a crime against the law of nations, punishable by any nation which obtains jurisdiction over the pirates.

Mutiny, an internal seizure of a vessel by the passengers or crew, has not been expressly recognized as a violation of the law of nations. There is, however, strong support for a broad interpretation of piracy that would include mutiny and internal seizures within the definition of piracy. Such an interpretation would appear to further the purposes of the laws against piracy, including navigational safety on the seas and security of international commerce, because the dangers inherent in the seizure are the same regardless of whether undertaken by persons on the vessel itself or by persons on another vessel. Further, the minor impingement on the state sovereignty of the flag nation resulting from a grant to all nations to punish such mutineers/pirates is outweighed by the establishment of an international rule of law that protects international commerce and safety on the high seas.

Although such a broad interpretation of the definition of piracy would further an important international legal principle, mechanisms currently established, such as extradition treaties, may have the same practical effect. Where an extradition agreement exists between nations, jurisdiction over mutineers may be obtained through a request for extradition because mutiny is generally an enumerated crime for which extradition will be available.

Both extradition treaties and international law under the broad interpretation of piracy are, however, limited in scope. Both doctrines are inapplicable where the mutiny/piracy is undertaken for non-private, public reasons, as in the cases of the politically-motivated mutinies discussed above. Thus, although both mechanisms may be available in a particular case, they are available only to the extent that the nation with jurisdiction determines that the mutiny/piracy is not politically motivated. In either case, the doctrines are limited by the subjective interpretation of a third party nation, which is likely to be motivated by its national interests in any particular case.